

HOUSE BILL 2428

By Goins

AN ACT to amend Tennessee Code Annotated, Title 38;
Title 39; Title 40; Title 53 and Title 55, relative to
civil property forfeitures.

BE IT ENACTED BY THE GENERAL ASSEMBLY OF THE STATE OF TENNESSEE:

SECTION 1. Tennessee Code Annotated, Title 40, Chapter 33, is amended by adding the following as a new part.

40-33-301. This part shall be known and may be cited as the "Forfeiture Act".

40-33-302.

(a) The purposes of this part are to:

(1) Make uniform the standards and procedures for the seizure and forfeiture of property subject to forfeiture;

(2) Protect the constitutional rights of persons whose property is subject to forfeiture and of innocent owners holding interests in property subject to forfeiture;

(3) Deter criminal activity by reducing its economic incentives;

(4) Increase the pecuniary loss from criminal activity;

(5) Protect against the wrongful forfeiture of property; and

(6) Transition from current civil forfeiture to exclusively criminal forfeiture.

(b) This part shall apply to all seizures, forfeitures, and dispositions of property subject to forfeiture to which this part is applicable. This part shall not apply to contraband, which may be subject to seizure pursuant to other applicable statutes, that is not property subject to forfeiture under this part.

40-33-303.

As used in this part:

(1) "Abandoned property" means:

(A) Personal property the rights to which and the control of which an owner has intentionally relinquished; and

(B) Does not include real property;

(2) "Actual knowledge" means a direct and clear awareness of information, a fact, or a condition;

(3) "Contraband" means goods that may not be lawfully imported, exported, or possessed, including drugs that are listed in Schedule I, II, III, IV, or V of the federal Controlled Substances Act (21 U.S.C. § 301 et seq.) and that are possessed without a valid prescription;

(4) "Conveyance" means a device used for transportation and:

(A) Includes a motor vehicle, trailer, snowmobile, airplane, vessel, and any equipment attached to the conveyance; but

(B) Does not include property that is stolen or otherwise possessed in violation of a law;

(5) "Conviction" or "convicted" means that a person has been found guilty of a criminal offense in a trial court whether by a plea of guilty, nolo contendere, or otherwise, and whether the sentence is deferred, diverted, suspended, or otherwise;

(6) "Crime" means a violation of a criminal statute for which property of the offender is subject to seizure and forfeiture;

(7) "Instrumentality" means all property that is lawful to possess but that is used in the furtherance or commission of an offense to which forfeiture applies. "Instrumentality" includes land, a building, a container, a conveyance, equipment, materials, a product, a computer, computer software, a telecommunications

device, a firearm, ammunition, a tool, money, a security, and a negotiable instrument and other devices used for exchange of property;

(8) "Law enforcement agency" means the employer of a law enforcement officer who is authorized to seize or has seized property pursuant to this part;

(9) "Law enforcement officer":

(A) Means a state or municipal police officer, county sheriff, deputy sheriff, wildlife resources officer, drug task force officer, or other state employee authorized by law to enforce criminal statutes; but

(B) Does not mean a correctional officer;

(10) "Owner" means a person who has a legal or equitable ownership interest in property;

(11) "Property" means tangible or intangible personal property or real property;

(12) "Property subject to forfeiture" means property or an instrumentality described and declared to be subject to forfeiture by this part or a specific statute outside of this part and which utilizes the forfeiture procedure set out in part 2 of this chapter; and

(13) "Secured party" means a person with a security or other protected interest in property, whether the interest arose by mortgage, security agreement, lien, lease, or otherwise; the purpose of which interest is to secure the payment of a debt or protect a potential debt owed to the secured party.

40-33-304.

(a) Property is subject to forfeiture under this part if:

(1) The person was arrested for an offense to which forfeiture applies;

(2) The person is convicted in a court of competent jurisdiction of a criminal offense for which forfeiture is applicable; and

(3) The state establishes by clear and convincing evidence that the property is subject to forfeiture as provided in subsection (b).

(b) Following a person's conviction for an offense to which forfeiture applies, a court may order the person to forfeit:

(1) Property the person acquired through commission of the offense;

(2) Property directly traceable to property acquired through the commission of the offense; and

(3) Any instrumentality the person used in the commission of the offense.

(c) Nothing in this section shall prevent property from being forfeited by the terms of a plea agreement that is approved by a court or by other agreement of the parties to a criminal proceeding.

(d) Subject to § 40-33-305, at the request of the state at any time, a court may issue an ex parte preliminary order to seize property that is subject to forfeiture and for which forfeiture is sought and to provide for the custody of the property. The execution on the order to seize the property and the return of the property, if applicable, are subject to this part and other applicable statutes. Before issuing an order pursuant to this subsection, the court shall make a determination that:

(1) There is a substantial probability that:

(A) The property is subject to forfeiture;

(B) The state will prevail on the issue of forfeiture; and

(C) Failure to enter the order will result in the property being destroyed, removed from the state, or otherwise made unavailable for forfeiture; and

(2) The need to preserve the availability of the property through the entry of the requested order outweighs the hardship to the owner and other parties known to be claiming interests in the property.

(e) Property subject to forfeiture may be seized at any time, without a prior court order, if:

(1) The seizure is incident to a lawful arrest for a crime or a search lawfully conducted pursuant to a search warrant and the law enforcement officer making the arrest or executing the search has probable cause to believe the property is subject to forfeiture and that the subject of the arrest or search warrant is an owner of the property;

(2) The property subject to seizure is the subject of a previous judgment in favor of the state; or

(3) The law enforcement officer making the seizure has probable cause to believe the property is subject to forfeiture and that the delay occasioned by the need to obtain a court order would result in the removal or destruction of the property or otherwise frustrate the seizure.

40-33-305.

(a) When a law enforcement officer seizes property that is subject to forfeiture, the officer shall provide an itemized receipt to the person possessing the property or, in the absence of a person to whom the receipt could be given, shall leave the receipt in the place where the property was found, if possible.

(b) Following the seizure of property, the defendant in the related criminal matter or another person who claims an interest in seized property may, at any time before sixty (60) days prior to a related criminal trial, claim an interest in seized property by a motion

to the court to issue a writ of replevin. A motion filed pursuant to this section shall include facts to support the person's alleged interest in the property.

(c) A person who makes a timely motion pursuant to this section shall have a right to a hearing on the motion before the resolution of any related criminal matter or forfeiture proceeding and within thirty (30) days of the date on which the motion is filed.

(d) At least ten (10) days before a hearing on a motion filed pursuant to this section, the state shall file an answer or responsive motion that shows probable cause for the seizure.

(e) A court shall grant a claimant's motion for return of the property if the court finds that:

(1) It is likely that the final judgment will require the state to return the property to the claimant;

(2) The property is not reasonably required to be held for investigatory reasons; or

(3) The property is the only reasonable means for a defendant to pay for legal representation in a related criminal or forfeiture proceeding.

(f) In its discretion, the court may order the return of funds or property sufficient to obtain legal counsel but less than the total amount seized, and it may require an accounting.

(g) In lieu of ordering the return of the property, a court may order:

(1) The state to give security or written assurance for satisfaction of any judgment, including damages, that may be rendered in a related forfeiture action; or

(2) Any other relief the court deems to be just.

40-33-306.

(a) Within thirty (30) days of making a seizure of property or simultaneously upon filing a related criminal indictment, the state shall file a complaint of ancillary forfeiture proceedings or return the property to the person from whom it was seized. A complaint of ancillary forfeiture proceedings shall include:

- (1) A description of the property seized;
- (2) The date and place of seizure of the property;
- (3) The name and address of the law enforcement agency making the seizure;
- (4) The specific statutory and factual grounds for the seizure;
- (5) Whether the property was seized pursuant to an order of seizure, and if the property was seized without an order of seizure, an affidavit from a law enforcement officer stating the legal and factual grounds why an order of seizure was not required; and
- (6) In the complaint caption and in the complaint, the names of persons known to the state who may claim an interest in the property and the basis for each person's alleged interest.

(b) The complaint shall be served upon the person from whom the property was seized, the person's attorney of record, and all persons known or reasonably believed by the state to claim an interest in the property. A copy of the complaint shall also be published at least three (3) times in a newspaper of general circulation in the judicial district of the court having jurisdiction over the complaint, or on the web site of the county in which the property is seized, until the forfeiture proceeding is resolved.

40-33-307.

(a) A person who claims an interest in seized property shall file an answer to the complaint of forfeiture within thirty (30) days of the date of service of the complaint. The answer shall include facts to support the claimant's alleged interest in the property.

(b) A forfeiture procedure under this part shall be filed in circuit or criminal court, and venue for a forfeiture proceeding is in the same court in which venue lies for the criminal matter related to the seized property.

(c) The forfeiture proceeding shall begin after the conclusion of the trial for the related criminal matter in an ancillary proceeding. The proceeding relating to a defendant's property shall be heard before the same judge and jury, if applicable, and the court, and the jury, if applicable, may consider the forfeiture of property seized from other persons at the same time or in a later proceeding. If the criminal defendant in the related criminal matter is represented by a public defender, the district public defender may authorize representation by the public defender of the defendant in the forfeiture proceeding.

(d) Discovery conducted in an ancillary forfeiture proceeding is subject to the rules of criminal procedure.

(e) An ancillary forfeiture proceeding that relates to the forfeiture of property valued at less than twenty thousand dollars (\$20,000) shall be held before a judge only.

(f) If the state fails to prove, by clear and convincing evidence, that a person whose property is alleged to be subject to forfeiture is an owner of the property:

(1) The forfeiture proceeding shall be dismissed and the property shall be delivered to the owner, unless the owner's possession of the property is illegal; and

(2) The owner shall not be subject to any charges by the state for storage of the property or expenses incurred in the preservation of the property.

(g) The court shall enter a judgment of forfeiture and the seized property shall be forfeited to the state if the state proves by clear and convincing evidence that:

(1) The property is subject to forfeiture;

(2) The criminal prosecution of the owner of the seized property resulted in a conviction; and

(3) The value of the property to be forfeited does not unreasonably exceed:

(A) The pecuniary gain derived or sought to be derived by the crime;

(B) The pecuniary loss caused or sought to be caused by the crime; or

(C) The value of the convicted owner's interest in the property.

(h) A court shall not accept a plea agreement or other arrangement by which a defendant contributes or donates property to a person, charity, or other organization in full or partial fulfillment of responsibility established in the court's proceeding.

(i) Following a person's conviction, the state may make a motion for forfeiture of substitute property owned by the person that is equal to but does not exceed the value of property that is subject to forfeiture but that the state is unable to seize. The court shall order the forfeiture of substitute property only if the state proves by a preponderance of the evidence that the person intentionally transferred, sold, or deposited property with a third party to avoid the court's jurisdiction and the forfeiture of the property.

(j) A person is not jointly and severally liable for orders of forfeiture of another person's property. When ownership of property is unclear, a court may order each

person to forfeit the person's property on a pro rata basis or by another means the court deems equitable.

(k) At any time following the conclusion of a forfeiture proceeding, the person whose property was forfeited may petition the court to determine whether the forfeiture was unconstitutionally excessive pursuant to the state or federal constitution.

(l) At a nonjury hearing on the petition, the petitioner has the burden of establishing by a preponderance of the evidence that the forfeiture was grossly disproportional to the seriousness of the criminal offense for which the person was convicted.

(m) In determining whether the forfeiture is unconstitutionally excessive, the court may consider all relevant factors, including:

- (1) The seriousness of the criminal offense and its impact on the community, the duration of the criminal activity, and the harm caused by the defendant;
- (2) The extent to which the defendant participated in the offense;
- (3) The extent to which the property was used in committing the offense;
- (4) The sentence imposed for the commission of the offense that relates to the property that is subject to forfeiture; and
- (5) Whether the criminal offense was completed or attempted.

(n) In determining the value of the property subject to forfeiture, the court may consider relevant factors, including the:

- (1) Fair market value of the property;
- (2) Value of the property to the defendant, including hardship that the defendant will suffer if the forfeiture is realized; and

(3) Hardship from the loss of a primary residence, motor vehicle, or other property to the defendant's family members or others if the property is forfeited.

(o) The court shall not consider the value of the property to the state when it determines whether the forfeiture of property is constitutionally excessive.

(p) A party to a forfeiture proceeding may appeal the circuit or criminal court's decision regarding the seizure, forfeiture, and distribution of property pursuant to this part.

40-33-308.

(a) The state acquires provisional title to seized property at the time the property was used or acquired in connection with an offense that subjects the property to forfeiture. Provisional title authorizes the state to hold and protect the property. Title to the property shall vest with the state when a trier of fact renders a final forfeiture verdict and the title relates back to the time when the state acquired provisional title. However, the state's title is subject to claims by third parties that are adjudicated pursuant to this part.

(b) Unless possession of the seized property is illegal or a different disposition is specifically provided for by law, and unless otherwise specified in this part, forfeited property that is not currency shall be delivered along with any abandoned property to the state treasurer for disposition at a public auction. Forfeited currency and all sale proceeds of the sale of forfeited or abandoned property shall be deposited in the state general fund.

(c) Proceeds from the sale of forfeited property received by the state from another jurisdiction shall be deposited in the general fund.

(d) A property interest forfeited to the state pursuant to this part is subject to the interest of a secured party unless, in the forfeiture proceeding, the state proves by clear

and convincing evidence that the secured party had actual knowledge of the crime that relates to the seizure of the property.

40-33-309.

(a) The property of an innocent owner, as provided in this section, shall not be forfeited.

(b) A person who claims to be an innocent owner has the burden of production to show that the person:

(1) Holds a legal right, title, or interest in the property seized; and

(2) Held an ownership interest in the seized property at the time the illegal conduct that gave rise to the seizure of the property occurred or was a bona fide purchaser for fair value.

(c) The state shall immediately return property to an established innocent owner who has an interest in homestead property, a motor vehicle valued at less than ten thousand dollars (\$10,000), or a conveyance that is encumbered by a security interest that was perfected pursuant to state law or that is subject to a lease or rental agreement. Return of seized property shall not occur if the secured party or lessor had actual knowledge of the criminal act upon which the forfeiture was based.

(d) If a person establishes that the person is an innocent owner pursuant to subsection (b), and the state pursues a forfeiture proceeding with respect to that person's property, to successfully forfeit the property, the state shall prove by clear and convincing evidence that the innocent owner had actual knowledge of the underlying crime giving rise to the forfeiture.

(e) A person who acquired an ownership interest in property subject to forfeiture after the commission of a crime that gave rise to the forfeiture and who claims to be an

innocent owner has the burden of production to show that the person has legal right, title, or interest in the property seized under this part.

(f) If a person establishes that the person is an innocent owner as provided in subsection (b) and the state pursues a forfeiture proceeding against the person's property, to successfully forfeit the property, the state shall prove by clear and convincing evidence that at the time the person acquired the property, the person:

- (1) Had actual knowledge that the property was subject to forfeiture; or
- (2) Was not a bona fide purchaser who was without notice of any defect in title and who gave valuable consideration.

(g) If the state fails to meet its burdens as provided in subsections (d) and (f), the court shall find that the person is an innocent owner and shall order the state to relinquish all claims of title to the innocent owner's property.

40-33-310.

(a) Seized currency alleged to be subject to forfeiture shall be deposited with the clerk of the court in which the criminal proceeding is occurring and the clerk shall place the currency in an interest-bearing account.

(b) Seized property other than currency or real property, not required by federal or state law to be destroyed, shall be:

- (1) Placed under seal; and
- (2)
 - (A) Removed to a place designated by the court; or
 - (B) Held in the custody of a law enforcement agency.

(c) Seized property shall be kept by the custodian in a manner to protect it from theft or damage and, if ordered by the court, insured against those risks.

(d) A law enforcement agency shall not retain any forfeited or abandoned property.

40-33-311.

(a) Every law enforcement agency shall prepare an annual report of the agency's seizures and forfeitures conducted pursuant to this part, and seizures and forfeitures conducted pursuant to federal forfeiture law, and the report shall include:

- (1) The total number of seizures of currency and the total amount of currency seized in each seizure;
- (2) The total number of seizures of property and the number and types of items seized in each seizure;
- (3) The market value of each item of property seized; and
- (4) The total number of occurrences of each class of crime that resulted in the agency's seizure of property.

(b) A law enforcement agency shall submit its annual reports to the department of safety and to the district attorney general's office in the agency's district. An agency that did not engage in seizure or forfeiture pursuant to this part or federal forfeiture law, or both, shall report that fact in its annual report.

(c) The department of safety shall compile the reports submitted by each law enforcement agency and issue an aggregate report of all forfeitures in the state.

(d) By April 1 of each year, the department of safety shall publish on its web site the department's aggregate report and individual law enforcement agency reports submitted for the previous year.

40-33-312.

(a) A law enforcement agency that holds seized property shall return the seized property to the owner of the property within a reasonable period of time that shall not exceed five (5) days after:

(1) A court finds that a person had a bona fide security interest in the property;

(2) A court finds that the owner was an innocent owner;

(3) The acquittal of or dismissal of related criminal charges against the owner of the property; or

(4) The disposal of the criminal charge that was the basis of the forfeiture proceedings by nolle prosequi.

(b) A law enforcement agency that holds seized property is responsible for any damages, storage fees, and related costs applicable to property that is returned to an owner pursuant to this section.

40-33-313.

(a) A law enforcement agency shall not directly or indirectly transfer seized property to a federal law enforcement authority or other federal agency unless the value of the seized property exceeds fifty thousand dollars (\$50,000), excluding the potential value of the forfeited property, if sold.

(b) A law enforcement agency shall not transfer property to the federal government if the transfer would circumvent the protections of this part that are otherwise available to a putative interest holder in the property.

(c) A law enforcement agency may transfer property to a federal law enforcement authority or other federal agency if:

(1) The law enforcement agency determines that the criminal conduct that gave rise to the seizure is interstate in nature and sufficiently complex to justify the transfer of the property; or

(2) The seized property may only be forfeited under federal law.

(d) For seized property exceeding fifty thousand dollars (\$50,000) that is transferred by a law enforcement agency to the federal government for the purposes of participation in the Department of Justice Asset Forfeiture Program (21 U.S.C. § 881(e)(1)(A) and (e)(3), 18 U.S.C. § 981(e)(2), and 19 U.S.C. § 1616a), the law enforcement agency shall deposit into the general fund all proceeds returned to it by the United States attorney general.

40-33-314.

(a) All personal property, including conveyances, subject to forfeiture under § 39-14-307, § 47-25-1105, § 53-11-451, § 55-50-504(h), § 55-10-414, § 57-3-411, § 57-5-409, § 57-9-201, § 67-4-1020, or § 70-6-202, that are seized on or after July 1, 2016, shall be seized and forfeited in accordance with the procedure set out in this part.

(b) This part shall apply to the seizure and forfeiture of all property that, prior to July 1, 2016, was forfeited utilizing the procedure provided in title 40, chapter 33, part 2. If the seizure of property subject to forfeiture by this act occurs on or after July 1, 2016, the procedure set out in this part shall be the exclusive procedure for the forfeiture of the seized property. If applicable property is seized prior to July 1, 2016, the procedure set out in title 40, chapter 33, part 2, shall remain the procedure for the forfeiture of that property.

SECTION 2. Tennessee Code Annotated, Section 40-33-201, is amended by deleting the word "All" from the beginning of the first sentence and substituting instead the language "Effective until July 1, 2016, all".

SECTION 3. Tennessee Code Annotated, Section 39-17-1008, is amended by deleting subsection (a) and substituting instead the following:

(a) Until July 1, 2016, any conveyance or real or personal property used in the commission of an offense under this part is subject to forfeiture under title 40, chapter 33, part 2. On or after July 1, 2016, any conveyance or real or personal property used in the commission of an offense under this part is subject to forfeiture under the Forfeiture Act, compiled in title 40, chapter 33, part 3.

SECTION 4. Tennessee Code Annotated, Section 39-17-1008, is amended by deleting from subsection (b) the language "Notwithstanding § 40-33-211" and substituting instead the language "Notwithstanding § 40-33-211 until July 1, 2016 and § 40-33-308, on and after July 1, 2016".

SECTION 5. Tennessee Code Annotated, Section 53-11-201, is amended by deleting subdivision (b)(2)(C) and substituting instead the following:

(C) Notwithstanding subdivision (b)(2)(B) to the contrary, any vehicle seized prior to July 1, 2016, by a county or municipal agency and forfeited under title 40, chapter 33, part 2, may be used in the local drug enforcement program for a period not to exceed five (5) years. Any vehicle seized on or after July 1, 2016, shall be disposed of as provided in § 40-33-308.

SECTION 6. Tennessee Code Annotated, Section 55-3-202, is amended by deleting the last sentence of subsection (d) and substituting instead the following:

The seizure and forfeiture of a motor vehicle under this section prior to July 1, 2016, shall be conducted in accordance with the procedure set out in title 40, chapter 33, part 2. The seizure of a motor vehicle under this section on or after July 1, 2016, shall be conducted in accordance with the procedure set out in the Forfeiture Act, compiled in title 40, chapter 33, part 3.

SECTION 7. Tennessee Code Annotated, Section 55-50-504, is amended by deleting subdivision (h)(1) and substituting instead the following:

(1) The vehicle used in the commission of a person's violation of § 55-50-504, when the original suspension or revocation was made for a violation of § 55-10-401, or a statute in another state prohibiting driving under the influence of an intoxicant, is subject to seizure and forfeiture in accordance with the procedure established in title 40, chapter 33, part 2, if the violation occurred prior to July 1, 2016. The department is designated as the applicable agency, as defined by § 40-33-202, for all forfeitures authorized by this subsection (h) that occur prior to July 1, 2016. The vehicle used in the commission of a person's violation of § 55-50-504, when the original suspension or revocation was made for a violation of § 55-10-401, or a statute in another state prohibiting driving under the influence of an intoxicant, is subject to seizure and forfeiture in accordance with the procedure established in the Forfeiture Act, compiled in title 40, chapter 33, part 3, if the violation occurred on or after July 1, 2016.

SECTION 8. Tennessee Code Annotated, Section 55-50-506, is amended by deleting subdivision (d)(1) and substituting instead the following:

(1) The vehicle used in the commission of a person's violation of this section prior to July 1, 2016, is subject to seizure and forfeiture in accordance with the procedure established in title 40, chapter 33, part 2. The department of safety is designated as the applicable agency, as defined by § 40-33-202, for all forfeitures authorized by this subsection (d). On or after July 1, 2016, a motor vehicle used in the commission of a violation of this section shall be seized and forfeited in accordance with the Forfeiture Act, compiled in title 40, chapter 33, part 3.

SECTION 9. This act shall take effect on July 1, 2016, the public welfare requiring it, and shall apply to any property subject to the seizure and forfeiture procedure set out in Tennessee Code Annotated, Title 40, Chapter 33, Part 2, that is seized on or after July 1, 2016.